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Kogilamah a/p Malayan v Aieyappan a/l Tulukanam

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–1469–06 OF 2013
MOHD HISHAMUDIN YUNUS, LINTON ALBERT AND HAMID SULTAN JJCA
16 NOVEMBER 2015

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Land Law — Ownership — Claim for — Appellant and respondent claimed for ownership of half share of a plot of land — Trial court found in favour of respondent — Appellant appealed against decision — Whether respondent proved case according to law — Whether trial judge findings in accordance with established jurisprudence on burden of proof — Whether documents relied by respondent entitled respondent for claim sought

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This case arose from the dispute between the appellant and the respondent as to the ownership of half share of a plot of land known as Lot 46 located in Kuala Langat, Selangor ('the half share of Lot 46') which was a part of a larger plot of land known as Lot 746 owned by one Ng Kim Chuan. The respondent brought an action at the High Court against the appellant for the ownership of the half share of Lot 46 and relied on sale and purchase agreements ('S&P') of the same between Ng Kim Chuan and one Ong Tai Bak ('the first S&P'); and subsequently between Ong Tai Bak and the respondent ('the second S&P'). The appellant on the other hand relied on a deed of assignment dated 1 October 1985 wherein her mother had allegedly assigned her the half share of Lot 46. The trial court found in favour of the respondent, hence this appeal.

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G **Held**, allowing the appeal and setting aside the order of the High Court with costs of RM30,000:

(1) It was clear from the facts of the case that the respondent had not proved his case according to law. It was misdirection on the part of the court to say that it was obliged to make a finding based on whatever evidence was available. The approach taken by the court had in actual fact compromised the integrity of the decision making process and was contrary to established jurisprudence relating to burden of proof (see para 6(a)).

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I (2) The respondent had not been issued with title, instead, they were holding contractual documents evidencing an interest in land without appropriate endorsement from registered owners of the property. The three documentary evidence relied by the court were hearsay documents in respect of ownership of the land relating to the master title. These three

documents would not entitle the respondent to seek the prayer as stated in the statement of claim. The learned trial judge was not required in law to take into account sterile documents to establish interest in land in the absence of the master title holder and other relevant witness to overcome the hearsay rule (see para 6(b) & (c)).

[Bahasa Malaysia summary

Kes ini berbangkit daripada pertikaian di antara perayu dan responden sebagai pemilik sebahagian daripada sebidang tanah yang dikenali sebagai Lot 46 yang terletak di Kuala Langat, Selangor ('sebahagian syer daripada Lot 46') yang mana adalah sebahagian daripada sebidang tanah yang lebih besar yang dikenali sebagai Lot 746 yang dimiliki oleh seorang yang bernama Ng Kim Chuan. Responden membawa tindakan di Mahkamah Tinggi terhadap perayu bagi milikan sebahagian syer daripada Lot 46 dan bergantung ke atas perjanjian jual beli ('PJB') terhadapnya di antara Ng Kim Chuan dan seorang yang bernama Ong Tai Bak ('PJB yang pertama'); dan kemudiannya di antara Ong Tai Bak dan responden ('PJB kedua'). Perayu sebaliknya bergantung ke atas surat ikatan penyerahhakan bertarikh 1 Oktober 1985 di mana ibunya telah didakwa menyerahkan kepadanya sebahagian syer daripada Lot 46. Mahkamah bicara memihak responden, maka rayuan ini.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi dengan kos sebanyak RM30,000:

(1) Adalah jelas daripada fakta kes bahawa responden tidak membuktikan kesnya mengikut undang-undang. Ia adalah salah arahan oleh pihak mahkamah untuk menyatakan bahawa ia bertanggungjawab untuk membuat dapatan berdasarkan atas apa-apa keterangan yang ada. Pendekatan yang diambil oleh mahkamah sebenarnya menjejaskan integriti proses membuat keputusan dan adalah bertentangan kepada jurispridens yang ditetapkan berkaitan beban pembuktian (lihat perenggan 6(a)).

(2) Responden tidak diberikan hakmilik, sebaliknya, mereka memegang dokumen kontraktual membuktikan kepentingan dalam tanah tanpa sokongan yang sewajarnya daripada pemilik berdaftar hartanah tersebut. Ketiga-tiga keterangan dokumentar yang digunakan oleh mahkamah adalah dokumen kata dengar berkenaan pemilikan tanah berkaitan hakmilik utama. Ketiga-tiga dokumen tidak memberikan hak kepada responden untuk memohon permohonan seperti yang dinyatakan di dalam pernyataan tuntutan. Hakim bicara yang bijaksana juga tidak dikehendaki dari segi undang-undang untuk mengambil kira dokumen steril bagi membuktikan kepentingan dalam tanah dalam ketiadaan pemegang hakmilik utama dan saksi relevan yang lain untuk mengatasi peraturan kata dengar (lihat perenggan 6(b) & (c)).]

Notes

For cases on claim for ownership, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 4235–4246.

Cases referred to

Damai Jaya Realty Sdn Bhd v Pendaftar Hakmilik Tanah, Selangor [2015] 2 MLJ 768, CA (refd)

Malayan Banking Bhd v Worthy Builders Sdn Bhd & Ors [2015] 3 MLJ 791, CA (refd)

Legislation referred to

Civil Law Act 1956

Evidence Act 1950 s 101

Appeal from: Civil Suit No MT2–22–620 of 2001 (High Court, Shah Alam)

M Manoharan (Lily Chua with him) (M Manoharan & Co) for appellant.

G Gunaseelan (G Redy and Selvarajoo with him) (G Reddy & Assoc) for respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant's (defendant) appeal against the decision of the learned High Court judge granting relief without strict proof of the respondent's case and very importantly without exhibiting related documents of title and/or evidence of the original owners of the property came up for hearing on 23 October 2014 and upon hearing, we adjourned it for further submission on 13 February 2015, and upon hearing the parties we allowed the appeal.

PRELIMINARIES AND JURISPRUDENCE

[2] This case relates to subsale of property by sale and purchase agreement and deed of assignment relating to an estate. In such cases, it is elementary principle that the original owner of the estate who was granted the title to the property and/or successors in the title need to be called and the relevant titles need to be exhibited, etc. It is also crucial to note that in any deed of assignment to pass the beneficial interest of the property to any other person, the master title holder must endorse the deed of assignment. A deed of assignment without such assignment is bad in law and will not pass any right or interest relating to the purchaser's interest in the portion of the estate (see Civil Law Act 1956; *Malayan Banking Bhd v Worthy Builders Sdn Bhd & Ors* [2015] 3 MLJ 791). It must also be noted that the law does not readily allow fragmentation of an estate without the approval of the relevant authorities (see *Damai Jaya Realty Sdn Bhd v Pendaftar Hakmilik Tanah, Selangor* [2015] 2 MLJ 768).

[3] In the instant case, the learned trial judge had taken cognisance that there was no sufficient evidence produced by the respondent, but nevertheless went on to decide and grant part of the prayers. Such an approach breaches the principles of civil litigation and in consequence we were constrained to allow the appeal, not because we were impressed by the appellant's case, but for fact that the appellant and respondent did not have valid documents to sustain their position as beneficial owners of the property according to law.

[4] The learned judge had documented the facts and reason to reach the decision. We take the view that court's time will be much saved by reproducing the brief judgment and set out our grounds.

[5] The brief judgment of the learned trial judge reads as follows:

> This is a classical case where most of the important witnesses from both sides are not before the court to give their oral testimonies either they have passed away or could not be traced since the filing of the suit before the matter is heard.
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> Be that as it may, the court will have to make do with whatever evidence available whether documentary or oral testimonies of witnesses.
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> The plaintiff had called five witnesses including the plaintiff himself whereas the defendant had called two witnesses before closing respective case.
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> The plaintiff's case can briefly be narrated as stated in the statement of claim as follows namely:
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> At all material time, Ng Kim Chuan had sold 311.52 acres of land known as Lot 746, CT 4828 Mukim Tg Dua Belas, Daerah Kuala Langat, Negeri Selangor to 81 purchasers ('the said land'). One of the 81 purchasers was Ong Tai Bak who purchased 2 1/2 acres of Sub-Lot 46 ('the half share of Lot 46') from Ng Kim Chuan via sale and purchase agreement dated 17 July 1978 ('the first S&P'). Subsequently, Ong Tai Bak sold the half share of Lot 46 to the plaintiff via S&P dated 18 July 1978 ('the second S&P'). The plaintiff had paid quit rents for the half share of Lot 46 since 1982 and thereafter had cleared the said half share and developed it by planting oil palm. The defendant had trespassed on the said half share of Lot 46 and had evicted the plaintiff from the said half share of Lot 46 from April 1998.The plaintiff suffered loss of profit from the sale of oil palm fruits about RM800–RM1000 per month as the defendant had collected the same since April 1998 till today.
>
> *The plaintiff claims against the defendant the following reliefs namely:*
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> The plaintiff had withdrawn the first prayer for a declaration that the judgment obtained earlier ie on the 2 November 1995 that the defendant was the rightful owner of the five acres as the same had been set aside by the plaintiff on the 18 October 2012.
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> The plaintiff prays for a declaration that the plaintiff is the beneficial owner of the half share of Lot 46, special damages for loss of profit, general damages, interest and costs.
>
> The defendant's case:

The defendant's late father was one of the purchasers of the said land who bought it from Ng Kim Chuan for a purchase price of RM2,500 on the 30 October 1969. Ng Kim Chuan did not provide a written S&P of Lot 46 despite attempts to obtain it from him. A sum of RM20 was paid as fees for the said agreement and also paid quit rents for Lot 46. Ng Kim Chuan was alleged to have taken advantage of the defendant's late mother illiteracy and by fraudulent means had let the defendant's late mother into signing a S&P dated 30 October, 1981 for the sale of only 2 1/2 acres of Lot 46. The defendant's late mother had commenced another civil suit against Ng Kim Chuan that she was entitled to the five acres of Lot 46. The judgment in respect of this suit obtained by the defendant against Ng Kim Chuan had been set aside by the plaintiff on the 18 October 2012. The issue of fraud in that suit has never been ventilated at the trial either in that suit independently or by way of consolidation with the present case.

The evidence by the plaintiff:

The plaintiff relied heavily on the three documentary evidence alluded to the court in the course of the trial namely:

That there were documentary proof that 2 1/2 half share of Lot 46 was sold by /Ng Kim Chuan to Ong Tai Bak dated the 17th July 1978 for $1000. Then there was an agreement entered between Ong Tai Bak with the plaintiff whereby the former had sold the 2 1/2 half share of Lot 46 to the latter for $10,0000. This S&P is marked as exh P1. According to the plaintiff there was no agreement to show that five acres of Lot 46 was sold to the father of the defendant. However there a deed of assignment dated 1 October 1985 (exh D46) between the defendant's late mother Patchaimah and the defendant whereby the defendant's late mother had assigned 2 1/2 acres of half share of Lot 46 to the defendant.

The defendant's evidence:

The defendant doubted the validity of S&P between Ng Kim Chuan and Ong Tai Bak and also the S&P between Ong Tai Bak and the plaintiff. That the best person to verify both S&Ps would be Ng Kim Chuan and Ong Tai Bak and since both have passed away the issue of the authenticity of both S&Ps are not proven and remains doubtful.

Ng Kim Chuan did not state anywhere in its affidavit in reply exhibit P20 that he had ever signed S&Ps with either Ong Tai Bak or the plaintiff. Failure to verify both the S&Ps means that there is a break in the chain of evidence. The defendant also avers that the witness to the plaintiffs S&P was one Dato' Lee Eng Teh. He is the best person to confirm the signing of the plaintiff's S&P. Dato' Lee Eng Teh would be an independent witness and credible. The defendant also doubted that Ong Tai Bak fully understood the nature and contents of the two S&Ps. The defendant also alleged that the witnesses called by the plaintiff could be interested or witnesses who could be biased in their evidence as they are related to the plaintiff in one way or another.

Finding of the court:

It is rather unfortunate that when this case came up for trial important witness who could shed light on the case were not here to testify because they have either passed away or could no longer be traced. Invariably this posed the court with documentary evidence which is the bone of contention of this trial as the stake

involved is high. The court does not envy its position when it is asked to adjudicate on a matter which has profound effect on the parties when the court is hampered in its availability of coherent witnesses.

Be that as it may the court had spent days hearing oral testimonies of witnesses from both side of the divide and the court has analysed the evidence before the court with a fine tomb comb and is now ready to give its decision.

The court has heard the oral testimony of witnesses and agree with the view of the learned counsel for the plaintiff that the documentary evidence such as the S&P between Ng Kim Chuan and Ong Tai Bak and S&P between Ong Tai Bak and the plaintiff and the deed of assignment between the defendant's late mother and the defendant are all compelling evidence for the court to consider. The court should not also lose sight of the fact the plaintiff is the purchaser in the second S&P dated 18 July 1978 between him and Ong Tai Bak. The defendant is the assignee in the deed of assignment (exh D46) dated 1st October 1985 wherein her mother had assigned to her the half share of the said land in Lot 46. The court cannot disregard the documentary evidence as they are quite clear in its meaning.

Having considered the evidence as a whole the court is of the view that the plaintiff has succeeded in proving its claim for the 2 1/2 acres being half share of Lot 46 on the balance of probability. The court hereby allowed the plaintiff's claim for a declaration that the plaintiff is the rightful beneficial owner of 2 1/2 acres being half share of Lot 46 under CT 4828, Lot 746, Mukim Tg Dua Belas, Kuala Langat, Selangor.

The court also allowed special damages for loss of income of RM186,000 from April 1998 till realisation. General damages is not allowed as it is not proven. And interest of 5% from date of judgment till realisation. Costs of RM15,000 to the plaintiff. Parties are at liberty to apply.

On 9 September, 2013 the plaintiff filed an application to amend the draft judgment to include the rate of interest at 4% from date of filing till date of judgment and thereafter interest at 5%pa till realisation. The court allowed the plaintiff's application after hearing argument from both parties. The court was of the view that the court had the power to recall an order pronounced but not perfected. *In re Harrison's Share under a Settlement, Harrison v Harrison* [1955] 1 Ch 260 the court held that an order pronounced by a judge whether in open court or chambers, can always be withdrawn, altered, modified by him, either on his own initiative or an the application of a party until such time as the order has been drawn up, passed and entered.

[6] We have read the memorandum of appeal and the submission of the parties. We take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) it is well established that the legal burden is on the plaintiff to prove its case (see s 101 of the Evidence Act 1950). It is clear from the facts of the case that the plaintiff has not proved his case according to law. It was misdirection on the part of the court to say that it is obliged to make a finding based on whatever evidence is available. The approach taken by

A the court has in actual fact compromised the integrity of the decision making process and is contrary to established jurisprudence relating to burden of proof;

(b) the plaintiff in this case has not been issued with title. What they are holding are contractual documents evidencing an interest in land without appropriate endorsement from registered owners of the property. The three documentary evidence relied by the court were hearsay documents in respect of ownership of the land relating to the master title. These three documents will not entitle the plaintiff to seek the prayer as stated in the statement of claim (see *Malayan Banking Bhd v Worthy Builders Sdn Bhd & Ors* [2015] 3 MLJ 791); and

(c) the learned trial judge is not required in law to take into account sterile documents to establish interest in land in the absence of the master title holder and other relevant witness to overcome the hearsay rule.

[7] For reasons stated above, we allowed the appeal and set aside the order of the High Court with costs of RM30,000. The deposit is to be refunded.

Appeal allowed and order of High Court set aside with costs of RM30,000.

Reported by Dzulqarnain Ab Fatar